Filed 12/26/18 P. v. Fregoso CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. EFREN FREGOSO, Defendant and Appellant.	H044572 (Santa Clara County Super. Ct. Nos. C1111513 & C1363935)

Defendant Efren Fregoso pleaded no contest to conspiracy to sell methamphetamine; three counts of possession of methamphetamine for sale; possession of a firearm by a felon; possession of ammunition by a prohibited person; and possession of a false compartment for storing controlled substances. He admitted several enhancements, including allegations that he had suffered two prior strike convictions. At sentencing the trial court imposed a total term of 25 years to life consecutive to four years in state prison.

Fregoso raises four claims on appeal. First, he contends the trial court erred in denying his motion to suppress evidence seized in a vehicle search. Second, he contends the court erred in denying his motion to disclose the identity of a confidential informant. Third, he contends the court erred in denying his motion to "eliminate" a prior strike conviction under *People v. Vargas* (2014) 59 Cal.4th 635 (*Vargas*). Fourth, he contends

the court erred in denying his motion to strike a prior strike conviction under *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497 (*Romero*).

For the reasons below, we conclude Fregoso's claims are without merit. We will affirm the judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Procedural Background

In case No. C1111513, the prosecution charged Fregoso by information with three counts: Count 1—conspiracy to violate Health and Safety Code sections 11378 and 11379 (Pen. Code, § 182, subd. (a)(1))[1]; and counts 2 and 3—possession of methamphetamine for sale (Health & Saf. Code, § 11378). The prosecution further alleged Fregoso had suffered two prior convictions qualifying as violent or serious felonies (§§ 667, subd. (b)-(i), 1170.12), and had served two prior prison terms (§ 667.5, subd. (b)).

In case No. C1363935, the prosecution charged Fregoso by information with four counts: Count 1—possession of methamphetamine for sale (Health & Saf. Code, § 11378); count 2—possession of a firearm by a felon (§ 29800, subd. (a)(1)); count 3—possession of ammunition by a prohibited person (§ 30305, subd. (a)(1)); and count 4—possession of a false compartment for storing controlled substances (Health & Saf. Code, § 11366.8, subd. (a)). The information alleged the same prior convictions as alleged in case No. C1111513, above. The information further alleged Fregoso committed all four offenses while out of custody on revoked bail status (§ 12022.1). As to count 1, the information alleged Fregoso was in possession of at least 57 grams of methamphetamine (§ 1203.073, subd. (b)(2)); that he was personally armed with a firearm (§ 12022, subd. (c)); and that his possession of a firearm constituted a strike (§§ 667, 1170.12).

[1] Subsequent undesignated statutory references are to the Penal Code.

In case No. C1363935, Fregoso moved to suppress the fruits of a vehicle search, and he simultaneously moved to disclose the identity of a confidential informant, as discussed below in sections II.A and II.B. Following hearings on these matters, the trial court denied both motions.

In February 2016, Fregoso moved in both cases to "eliminate" a prior strike allegation under *Vargas* as discussed below in section II.C (*Vargas* motion). The trial court denied the *Vargas* motion in March 2016.

In August 2016, Fregoso entered pleas in both cases. He pleaded no contest to all counts as charged, and he admitted all allegations. The parties did not reach any agreement on the terms of the sentences, but Fregoso retained the right to move under *Romero* to strike one or more prior strike convictions under as discussed below in section II.D (*Romero* motion). Fregoso filed a *Romero* motion to strike one prior allegation in October 2016.

In February 2017, the trial court denied Fregoso's *Romero* motion and sentenced him in both cases. In case No. C1111513, the court imposed a total term of six years, consisting of the three-year term on count 1 doubled to six years for the prior convictions. On both of counts 2 and 3, the court imposed four-year terms but stayed them under section 654. The court struck the terms for the prior prison term enhancements.

In case No. C1363935, the court imposed a total term of 25 years to life consecutive to four years. The term consisted of 25 years to life on count 1 plus a consecutive four-year term for the arming enhancement, with all remaining terms to run concurrently.

B. Facts of the Offenses

1. Case No. C1111513[2]

Fregoso was an inmate at Soledad State Prison in 2011. Law enforcement officers reviewed phone calls between Fregoso and a codefendant discussing drug sales. According to the probation report, the codefendant "often would 3-way call other men who would discuss drug sales and money with the defendant. During some conversations between [Fregoso] and the codefendant, and at times . . . other men, they had discussed the quality of the methamphetamine, arrests that occurred of the other men for drug sales, and paying their bail." Two vehicle searches of one of the men identified in the calls resulted in seizures of 104 grams and 231.9 grams of methamphetamine.

2. Case No. C1363935

In August 2013, while Fregoso was on supervised release, police conducted a probation search of his residence. Mountain View Police Officer Wahed Magee testified about the circumstances of the search. Officer Magee testified that police had information from a confidential informant that Fregoso was living at the residence, which was not the address provided in his probation documents, and that a black Toyota Camry would be there. A records check of the Toyota showed it was registered in Fregoso's last name. Police knew Fregoso was subject to a probation search clause. The confidential informant had also informed the police that Fregoso drove the Toyota.

Fregoso lived at the residence with his niece Crystal Fregoso and her husband. When police knocked on the door, Crystal's husband answered and told them Fregoso lived there. A drug-detecting dog alerted on a safe in the bedroom of Crystal and her husband. Crystal and her husband told police the safe belonged to Fregoso. Inside the safe, police found $6,000 in cash; baggies; a scale with white residue; two cellular

[2] The statement of facts is based on the probation report.

telephones; Fregoso's credit card statement; a .40-caliber semiautomatic handgun with the serial number scratched off; a loaded magazine; and some loose ammunition.

In the search of Fregoso's bedroom, police found 1.1 grams of methamphetamine and a jar of marijuana. In Fregoso's mattress, police found a key fob for a Toyota Camry registered to Fregoso's brother. The police used the key fob to open the Toyota, which was parked outside the residence. Inside the Toyota, they found a secret compartment containing 460 grams of methamphetamine.

II. DISCUSSION

A. Search of the Toyota Camry

Fregoso contends the trial court erred by denying his motion to suppress the evidence seized in the search of the Toyota Camry.[3] He argues that the probation search did not extend to the vehicle because he did not exercise control over the vehicle. The Attorney General contends that Fregoso lacks "standing" to challenge the search of the vehicle because he had no expectation of privacy in it. Alternatively, assuming Fregoso had an expectation of privacy in the vehicle, the Attorney General contends the police had a reasonable basis to believe he had a possessory interest in it sufficient to justify the search. For the reasons below, we conclude the trial court did not err by denying the motion to suppress.

1. Background

As described above, the police conducted a warrantless probation search of Fregoso's residence, as well as a Toyota Camry parked outside. Police relied in part on information from a confidential informant to determine Fregoso was associated with the Toyota. Fregoso moved to suppress the evidence seized in the search of the vehicle, and

[3] Fregoso also challenged the search of the safe, but he does not directly raise this claim on appeal. As set forth in section II.B, however, he indirectly challenges the search of both the safe and the vehicle as part of his claim that the court erred by denying his motion to disclose the identity of the confidential informant. We find that claim without merit for the reasons below.

he moved simultaneously to disclose the identity of the confidential informant. He conceded he was subject to a probation search, but he argued that the Toyota, which was registered to his brother, fell outside the permissible scope of the search because the vehicle was not under his (Fregoso's) joint control or access. The prosecution opposed the motion on the ground that the vehicle was under Fregoso's control and therefore subject to search under the probation search clause.

The trial court held evidentiary hearings on both motions, including an in camera hearing of the police officer who managed the confidential informant. At the first hearing, the court questioned whether Fregoso had an expectation of privacy with respect to an area over which he assertedly had no control. Fregoso submitted supplemental briefing arguing that he had "standing" to challenge the search of the vehicle because the prosecution had asserted he had control over it.

The court denied the motion to suppress. As to the vehicle search, the court found the search fell within the probation search clause because the key appeared to be exclusively under Fregoso's custody and control. Specifically, the court found that "the location of the actual key was found very close to Mr. Fregoso's actual person in an area that I think, fairly, you can conclude is exclusively in the custody and control of Mr. Fregoso: his—his mattress and box springs area." The court also relied on the doctrine of inevitable discovery, finding that the police had a custom and practice of taking key fobs found in a search and using them to locate vehicle in the area. The court stated it was not relying on information provided by the confidential informant to find the search justified.

2. Legal Principles

"The Fourth Amendment provides that '[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated . . . .' (U.S. Const., 4th Amend.) This guarantee has been incorporated into the Fourteenth Amendment to the federal Constitution and thereby

applies to the states. [Citation.]" (*People v. Espino* (2016) 247 Cal.App.4th 746, 755 (*Espino*).)

"It is 'well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent.' [Citations.] In California, probationers may validly consent in advance to warrantless searches in exchange for the opportunity to avoid service of a state prison term. [Citations.]" (*People v. Woods* (1999) 21 Cal.4th 668, 674-675 (*Woods*).) "[O]fficers generally may only search those portions of the residence they reasonably believe the probationer has complete or joint control over." (*Id.* at p. 682.)

"In response to a motion to suppress evidence seized in a warrantless search, the prosecution bears the burden to prove police conducted the search under a valid exception to the Fourth Amendment's warrant requirement." (*Espino*, *supra*, 247 Cal.App.4th at p. 756.) "In reviewing a lower court's ruling, we are bound by factual findings supported by substantial evidence. [Citation.] The ultimate question of whether a search was unreasonable is a question of law we review de novo." (*Id.* at p. 755.)

3. The Police Had a Reasonable Basis to Search the Vehicle

Fregoso contends the police lacked any reasonable basis to search the Toyota because they knew it did not belong to him, and they failed to obtain the true owner's consent. He argues that the police had no reasonable basis to believe he had a sufficient possessory interest or control over the vehicle to justify the search. The Attorney General contends the existence of the key fob in Fregoso's mattress made it reasonable to believe Fregoso had joint control over the vehicle. Arguing in the alternative, the Attorney General contends that if Fregoso had no joint control over the vehicle then he had no expectation of privacy in it.

Substantial evidence supports the trial court's factual findings that Fregoso had joint control over the Toyota. Officer Magee testified that the police found the Toyota key fob in the mattress of Fregoso's bed in his bedroom. The key unlocked the vehicle,

which was parked in front of the residence. Officer Magee added that police had corroborating information from a confidential informant that Fregoso had driven the vehicle. Given these findings, we conclude the police could "reasonably believe [Fregoso had] complete or joint control" over the Toyota. (*Woods, supra,* 21 Cal.4th at pp. 674-675.)

Even assuming Fregoso had no control over the Toyota, nor any possessory interest in it, his claim would still fail. As the Attorney General points out, under that assumption Fregoso would have no expectation of privacy in the vehicle. " '[I]n order to claim the protection of the Fourth Amendment, a defendant must demonstrate that he personally has an expectation of privacy in the place searched, and that his expectation is reasonable; *i.e*., one that has "a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." ' [Citation.]" (*People v. Ayala* (2000) 23 Cal.4th 225, 255.) Because Fregoso "assert[ed] 'neither a property nor a possessory interest in the automobile nor an interest in the property seized,' " he had no expectation of privacy in the vehicle, and hence no basis for a claim under the Fourth Amendment. (*People v. Valdez* (2004) 32 Cal.4th 73, 122, quoting *Rakas v. Illinois* (1978) 439 U.S. 128, 148.)

For the reasons above, we conclude Fregoso's claim that the trial court erred when it denied his motion to suppress the evidence is without merit.

B. Denial of the Motion to Disclose the Identity of the Confidential Informant

Fregoso contends the trial court erred by denying his motion to disclose the identity of a confidential informant who provided police with information in connection with the search of the residence and vehicle. He asks that we review the transcript of an in camera hearing the court held to question the police officer who had received information from the informant. The Attorney General agrees that Fregoso is entitled to appellate review of the transcript of the in camera hearing. We have reviewed the transcript, and for the reasons below, we find no error in the denial of Fregoso's motion.

1. Background

As described above, Officer Magee testified that a confidential informant had given the police information connecting Fregoso to the residence and the Toyota Camry. Fregoso filed a written motion to disclose the identity of the confidential informant. He argued that the informant was a material percipient witness on the issue of guilt or innocence, requiring disclosure of the informant's identity. In response, the trial court held an in camera hearing to question Campbell Police Officer Michael Short about the circumstances of the informant's involvement. Following the in camera hearing, the court found the informant was not a material witness, and that "the examination in the in camera hearing did not disclose information that . . . would cause the confidential informant to be a material witness." Accordingly, the court denied the motion and sealed the transcript of the in camera hearing.

2. Legal Principles

The scope of the common law privilege to refuse disclosure of the identity of a confidential informant is set forth in *Roviaro v. United States* (1957) 353 U.S. 53 (*Roviaro*). (*People v. Hobbs* (1994) 7 Cal.4th 948 (*Hobbs*).)[4] " 'The scope of the privilege is limited by its underlying purpose. Thus, where the disclosure of the contents of a communication will not tend to reveal the identity of an informer, the contents are not privileged. Likewise, once the identity of the informer has been disclosed . . . the privilege is no longer applicable. [¶] A further limitation on the applicability of the privilege arises from the fundamental requirements of fairness. Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege

[4] Although *Hobbs* concerned the disclosure of an informant's identity when the confidential information is used as the basis for a search warrant, the Attorney General concedes that the same principles apply here, where the police conducted a warrantless search under a probation search clause.

must give way. In these situations the trial court may require disclosure and, if the Government withholds the information, dismiss the action.' " (*Id.* at pp. 958-959, quoting *Roviaro*, *supra*, 353 U.S. at p. 61.)

The procedures for judicial review of information provided by a confidential informant are described in *Hobbs*, *supra*. Upon a properly noticed motion by the defendant, the trial court should conduct an in camera hearing consistent with the guidelines set forth in section 915, subdivision (b), and *People v. Luttenberger* (1990) 50 Cal.3d 1. (*Hobbs, supra,* 7 Cal.4th at p. 972.) The court should first determine whether sufficient grounds exist for maintaining the confidentiality of the informant's identity. The court should then determine what sealing is necessary to avoid revealing the informant's identity. "[T]he lower court may, in its discretion, find it necessary and appropriate to call and question the affiant, the informant, or any other witness whose testimony it deems necessary to rule upon the issues." (*Id.* at p. 973.) The procedures further allow for appellate review of any sealed records. "In all instances, a sealed transcript of the in camera proceedings, and any other sealed or excised materials, should be retained in the record along with the public portions of the search warrant application for possible appellate review." (*Id.* at p. 975.)

Evidence Code section 1042 further provides that the court "shall not order disclosure . . . unless, based upon the evidence presented at the hearing held in the presence of the defendant and his counsel and the evidence presented at the in camera hearing, the court concludes that there is a reasonable possibility that nondisclosure might deprive the defendant of a fair trial." (Evid. Code, § 1042, subd. (d).)

3. The Trial Court Properly Denied the Motion to Disclose the Identity of the Confidential Informant

At the urging of both parties, we have reviewed the sealed transcript of the in camera hearing. In that hearing, the trial court questioned the police officer who met with the confidential informant to receive information about Fregoso's living

circumstances, the vehicle he drove, and his involvement with methamphetamine. Nothing in the record shows the informant could have provided information relevant or helpful to Fregoso's defense. There was no "reasonable possibility that nondisclosure might deprive [Fregoso] of a fair trial." (Evid. Code, § 1042, subd. (d).) Nor was the information "essential to [the] fair determination" of the matter. (*Roviaro*, *supra*, 353 U.S. at p. 61.) Considering the "fundamental requirements of fairness," (*id.* at p. 60), we conclude Fregoso had no right to learn the informant's identity. Accordingly, the trial court did not err in denying the motion.

Fregoso further contends the trial court erred by interviewing the police officer while not interviewing the informant directly. For this proposition, Fregoso relies on *People v. Ruiz* (1992) 9 Cal.App.4th 1485 (trial court erred by failing to question the confidential informant). As acknowledged in *Ruiz*, however, "there is no general requirement that an informant must be present or testify at an in camera hearing on a motion to disclose the informant's identity." (*Id.* at p. 1489.) This is not a case where the informant's testimony was "essential" as it was in *Ruiz*. (*Ibid.*)

C. Denial of the Vargas *Motion*

In both cases, the prosecution alleged Fregoso had suffered two prior strike convictions. Before entering any pleas, Fregoso filed a written "Motion to Eliminate One Allegation of Prior 'Strike' " under *Vargas*, *supra* (trial court was required to dismiss one of two strike convictions where both convictions were based on the same single act). He argued that both strikes arose from the same act and therefore did not qualify as dual strike convictions. The trial court denied the motion, and Fregoso later admitted both strikes. He now contends the court erred by denying the *Vargas* motion, relying on the same grounds presented below. The Attorney General contends the denial of the motion was not an abuse of discretion because the strikes arose from more than one criminal act. For the reasons below, we conclude Fregoso's claim is without merit.

1. Background

a. Facts of the Prior Convictions

Apart from the filings and arguments made by trial counsel, the record holds no evidence concerning the facts of Fregoso's prior convictions. Fregoso, however, stipulated to the following facts as set forth in the prosecutor's pleadings:[5] "[O]n August 28, 1996, [Fregoso], his brother, Sam Fregoso, and another codefendant, Joel Rueda, were celebrating the victim's (Caesar Garcia's) sale of his auto body shop in the victim's garage. The victim believed all three men were his friends. After leaving and returning to the garage a few times, the last time the men entered the garage, Sam Fregoso was armed with a gun, Rueda was armed with a knife or an icepick and [Fregoso] was armed with a stun gun. The men demanded that the victim give him the money. The victim argued with the men and when he attempted to deflect the gun that Sam Fregoso was pointing at him, [Sam] Fregoso fired at the victim who stated he felt like the bullet had grazed the top of his head. Sam Fregoso then pistol-whipped the victim who then attempted to flee from the men by running out of the garage, but all three men pursued him. The victim described being hit and feeling someone removing the money from his pants pocket. The three men then fled, with [Fregoso] and one of the other men driving away in [Fregoso's] car. It was not until after the beating by the three men was over that the victim realized that he had been stabbed multiple times in the back. He was transported to the hospital by a friend and immediately taken into surgery to repair the injuries he had suffered in the attack."

[5] We requested supplemental briefing on whether Fregoso implicitly stipulated to these facts. Fregoso contends he did. The Attorney General argues Fregoso did not stipulate to the facts, but forfeited any factual challenge. Regardless, the parties agree on these facts.

b. Procedural Background

In both cases, the prosecution alleged Fregoso had suffered two prior strike convictions arising from the above offenses: Robbery (§§ 211, 212.5 subd. (c)), and assault with a deadly weapon (§ 245, subd. (a)(1)). As Fregoso concedes, he had pleaded guilty to those offenses and admitted he personally used a stun gun during the assault.

After the trial court denied the motions to suppress and to disclose the informant's identity, but before Fregoso entered any pleas, he moved to "eliminate" one allegation of a prior strike. He contended the two convictions above "arose out of the same act, were closely related, and thus do not qualify as dual strike convictions." The motion was grounded primarily on *Vargas*, *supra*. The prosecution opposed the motion on the ground that the two convictions arose from "separate acts, or at the very least, an indivisible course of conduct . . . ." For this proposition, the prosecution relied on *People v. Benson* (1998) 18 Cal.4th 24 (*Benson*) (prior convictions arising from the same transaction may each be counted as "strikes" under "three strikes" law, even if the sentence on one prior conviction was stayed under section 654).

The trial court denied the *Vargas* motion after a hearing on the matter. First, the court distinguished between its power to strike a prior conviction under *Vargas* and its discretionary authority to strike a prior conviction under *Romero*. The court characterized the former as "a legal issue" and informed Fregoso he could later invoke the court's discretionary power under *Romero* at the time of sentencing. As to the *Vargas* motion, the court reasoned that the facts of Fregoso's convictions were more similar to those of the prior convictions at issue in *Benson* as compared to *Vargas*. Looking to *Benson*, the court concluded that "a person who commits an additional act of violence in the course of a serious or prior felony should be treated differently than a person who committed the initial felony but whose criminal conduct did not include the additional violence."

After Fregoso entered his pleas in both cases, he filed a *Romero* motion to dismiss a prior conviction, discussed below in section II.D. At the hearing on that matter, the court further explained its prior denial of the *Vargas* motion as follows: "I have previously held that the rule of *Vargas* is inapplicable here because the crime involved additional gratuitous violence that went well beyond what was necessary to the robbery itself. Although in this case a codefendant was the actual perpetrator of that gratuitous additional violence, [Fregoso] as an aider and abettor is vicariously liable for, and indeed was convicted of, that conduct to the same extent as if he had been an actual perpetrator. [¶] For this reason, the rule of *Vargas* or the fact that that offense arises out of the same incident, neither compelled this court to strike that conviction for purposes of sentencing here."

2. Legal Principles

"[W]here two prior crimes are based on the same act, such a close connection might require a sentencing court to strike one of them pursuant to its authority under section 1385." (*Vargas, supra*, 59 Cal.4th at p. 643.) If the prior strike convictions were based on the same act, committed at the same time, and against the same victim, then the trial court is required to strike or dismiss one of the prior strike convictions for sentencing purposes under the Three Strikes Law. (*Id.* at p. 638.) However, multiple crimes may constitute multiple strikes even when the crimes occurred during a single course of conduct and punishment was stayed under section 654. (*Benson, supra,* 18 Cal.4th at pp. 27-31.)

The Supreme Court in *Vargas* did not expressly set forth a standard of review. However, both parties here agree that we must review the trial court's denial of the *Vargas* motion under an abuse of discretion standard. We do so accordingly.

3. Denial of the* Vargas *Motion Was Not an Abuse of Discretion

We first consider Fregoso's contention that the trial court's ruling was improper because it relied on facts outside the record of conviction. For this proposition, he relies

on *People v. Gallardo* (2017) 4 Cal.5th 120 (*Gallardo*). In *Gallardo*, the Supreme Court considered whether a defendant's Sixth Amendment right to a jury trial limits a trial court's factfinding power when imposing a sentence enhancement based on a prior strike conviction. The court held, "While a sentencing court is permitted to identify those facts that were already necessarily found by a prior jury in rendering a guilty verdict or admitted by the defendant in entering a guilty plea, the court may not rely on its own independent review of record evidence to determine what conduct 'realistically' led to the defendant's conviction." (*Id.* at p. 124.) From this reasoning, the court concluded that "the trial court violated defendant's Sixth Amendment right to a jury trial when it found a *disputed* fact about the conduct underlying defendant's [prior strike] conviction that had not been established by virtue of the conviction itself." (*Id.* at pp. 124-125, italics added.) Fregoso argues that the trial court here engaged in such prohibited factfinding in the course of denying his *Vargas* motion.

The Attorney General contends the Sixth Amendment right to a jury trial as construed by *Gallardo* does not apply in the context of a *Vargas* motion. He characterizes a *Vargas* motion as a "subspecies" of a *Romero* motion, and "not a motion disputing the existence of a prior strike conviction." He describes a *Vargas* motion as "a kind of *Romero* motion, in which the defendant seeks judicial clemency in the form of a dismissal of a prior strike conviction in the interests of justice." We are not persuaded on this point. Although the Supreme Court in *Vargas* considered the issue in the context of *Romero*, the court held a trial court is *required* to dismiss a prior strike condition when the offenses at issue arose at the same time from the same act against the same victim. (*Vargas*, *supra*, 59 Cal.4th at p. 645.) Under *Romero*, by contrast, a trial court's power to do so is discretionary. (*People v. Fuhrman* (1997) 16 Cal.4th 930, 948.)

We need not resolve this dispute, however. As Fregoso concedes on appeal, he stipulated to the above facts underlying the prior convictions. A defendant's Sixth Amendment right to a jury trial is subject to waiver, and as such the right applies to

disputed facts. (*Gallardo, supra*, 4 Cal.5th at p. 124; cf. *People v. Wilson* (2013) 219 Cal.App.4th 500, 504 [defendant's right to jury trial violated where trial court's factfinding required resolution of disputed fact].) Here, Fregoso does not dispute the facts; he expressly concedes that the above narrative accurately sets forth the facts of the prior offenses. We conclude that the trial court did not err by relying on the facts as set forth above.

Fregoso nonetheless argues that the facts underlying his prior convictions do not support the trial court's ruling. He characterizes his conduct as a "single act of robbing Garcia of the $10,000 he had in his possession." He argues that both the robbery and the assault occurred during the same single act because the assault with a deadly weapon—his use of the stun gun—occurred as part of the same indivisible transaction as the taking of the money.

The Attorney General contends the trial court properly based its denial of the motion on "the separateness of the act of assault and the act of robbery." The Attorney General points out that when Fregoso was sentenced for the prior convictions, the court imposed the two terms consecutively, implying that the court found the two offenses did not occur as part of the same act.[6] (See section 654 [an act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision].) The Attorney General further contends it was not an abuse of discretion for the trial court to rely on Fregoso's liability as an aider and abettor.

The trial court's ruling was not an abuse of discretion. The facts of the robbery and assault on Garcia support the court's finding that the crime constituted more than a

[6] At hearing on the *Vargas* motion, trial counsel for Fregoso conceded "it's not disputed" that the terms were imposed consecutively, and counsel stated that the court had taken judicial notice of that fact.

single act. After Fregoso and his two accomplices threatened Garcia with weapons, Fregoso's brother fired a gun at Garcia and pistol whipped him. When Garcia attempted to flee from the garage, the three men pursued him, beat him, and took the money from his pants pocket. Garcia was stabbed multiple times in the back at some point during this assault. The facts of this crime establish multiple acts by both Fregoso and his accomplices.

Fregoso contends the court erred by relying on aider and abettor liability because the trial court is limited to the record of conviction and that the court must apply a presumption that his convictions were for the least offense, absent evidence to the contrary. For this proposition, he relies on *People v. Guerrero* (1988) 44 Cal.3d 343, 352 (*Guerrero*). In *Guerrero*, the Supreme Court held that "the [sentencing] court may look to the entire record of the conviction to determine the substance of the prior foreign conviction; but when the record does not disclose any of the facts of the offense actually committed, the court will presume that the prior conviction was for the least offense punishable under the foreign law." (*Ibid.*)

As explained above, however, Fregoso stipulated to the facts of the prior convictions. The trial court was therefore not limited to the record of conviction, and its finding of aider and abettor liability was amply supported by the facts to which Fregoso stipulated. Finally, as noted above, the fact that the prior trial court imposed consecutive sentences for the prior convictions necessarily implies a prior finding that the conduct did not arise from a single act. Nothing in the record indicates Fregoso ever challenged that finding. The trial court therefore did not abuse its discretion by invoking aider and abettor liability to support its ruling.

For all these reasons, we conclude the trial court did not abuse its discretion by denying the *Vargas* motion. The facts of the prior convictions supported the court's finding that the robbery and assault of Garcia constituted more than a single act, such that

the rule of *Vargas* did not require the court to dismiss or strike one of the prior conviction allegations. Accordingly, this claim is without merit.

D. Denial of the Romero *Motion*

Fregoso contends the trial court erred by denying his motion to strike a prior strike conviction under *Romero*. He argues that his "background, his current and prior convictions, the age of the prior strike convictions, and the facts of his case put him outside the spirit of the Three Strikes law." The Attorney General contends the court acted within its discretion by denying the *Romero* motion. For the reasons below, we conclude the trial court did not err.

1. Background

When the trial court denied the *Vargas* motion, it informed Fregoso he could still move under *Romero* to dismiss a prior strike conviction at sentencing. Fregoso entered pleas in both cases and then moved to strike a prior conviction under *Romero*. The matter proceeded to sentencing, whereupon the trial court denied the *Romero* motion.

The trial court set forth numerous reasons for denying the *Romero* motion. The court first stated it had given the matter "an unprecedented amount of time and consideration." As to the current convictions, the court found they "all arise from an extended course of conduct between March and June of 2011, while from inside prison [Fregoso] conspired and actively worked to arrange the sales of methamphetamine on the outside. A search of [Fregoso's] home in August 2013 resulted in the remaining count, including the firearm enhancement and substantial quantities of methamphetamine." The court characterized the offenses as "not a trivial crime," and found "it demonstrates substantial planning and sophistication, including coordinating drug sales from within the California Department of Corrections and Rehabilitation, and continuing to engage directly in that activity after release on Post Release Community Supervision."

As to the prior strike convictions, the court found "[Fregoso], his brother and third codefendant Ureda, jointly robbed their unarmed victim. The evidence tends to establish

that [Fregoso's] brother was armed with a firearm. [Fregoso] had a stun gun. And Ureda was armed with an icepick which he ultimately used to stab the victim numerous times after the victim's property had already been taken. The wounds required emergency surgery." The court added that "Because the robbery was perpetrated by three persons acting together against a vulnerable victim and was followed by the gratuitous use of extreme violence and infliction of great bodily injury upon that victim, it's a very serious offense." After Fregoso was discharged from parole for those convictions, "he engaged in a dangerous high speed effort to avoid apprehension in a stolen BMW in 2007, and again in 2008, was fleeing the service of an arrest warrant and assaulted an officer resulting in great bodily injury. He was convicted for those offenses in February 2009, and sentenced to serve a term of six years in prison, being released ultimately in 2013."

Additionally, the court found, "[Fregoso] also has a significant history, including providing false information, resisting arrest, evading pursuing officers with reckless disregard for the safety of innocent persons, and even flight out of the country to avoid the consequences of his criminal conduct. For this reason, his possession of a firearm and ammunition, in combination with his demonstrated willingness to do what he deems necessary to avoid capture, regardless of the consequences to others, indicates a serious danger to public safety." As to a four-year period in which Fregoso remained free from any offenses, the court noted "that factor does not reflect a period of rehabilitation. It is attributable only to his flight to Mexico to avoid arrest, forcing the prosecution to institute extradition proceedings."

Finally, after considering various mitigating aspects of Fregoso's background, the court found, "With respect to [Fregoso's] background, character and prospects, based on the sophistication of his recent criminal conduct, there is no question in this court's mind that [Fregoso] has the intelligence, and perhaps the ability, to become a productive member of society. But there is also no question that he has taken few, if any, steps in that direction throughout his entire life." The court concluded that "[Fregoso] continues

to reoffend in a manner that places the security and safety of the public at risk. For these reasons, he falls squarely within the provisions of the three strikes sentencing scheme."

2. Legal Principles

The Supreme Court held in *Romero* that the trial court, on its own motion, is empowered under section 1385, subdivision (a) to dismiss prior felony conviction allegations (i.e., prior strikes) in cases brought under the law known as the Three Strikes law. (*Romero*, *supra*, 13 Cal.4th at pp. 529-530.) The court's discretion, however, is limited to instances in which dismissing such strikes is in the furtherance of justice, as determined by giving " ' "consideration both of the constitutional rights of the defendant, and *the interests of society represented by the People* . . . ." ' " (*Id.* at p. 530.) Thus, the court may not dismiss a sentencing allegation "solely 'to accommodate judicial convenience or because of court congestion[' citation, or] simply because a defendant pleads guilty. [Citation.] Nor would a court act properly if 'guided solely by a personal antipathy for the effect that the three strikes law would have on [a] defendant,' while ignoring 'defendant's background,' 'the nature of his [or her] present offenses,' and other 'individualized considerations.' [Citation.]" (*Id.* at p. 531.)

If the trial court dismisses one or more prior strikes, its reasons for doing so must be stated in an order entered on the minutes. (*People v. Williams* (1998) 17 Cal.4th 148, 161 (*Williams*).) Conversely, the trial court has no obligation to set forth its reasons for deciding *not* to dismiss a prior strike. (*In re Large* (2007) 41 Cal.4th 538, 546, fn. 6; see also *In re Coley* (2012) 55 Cal.4th 524, 560.) As our high court has explained: "The absence of such a requirement [that the court set forth its reasons for refusing to dismiss a prior strike] merely reflects the legislative presumption that a court acts properly whenever it sentences a defendant in accordance with the three strikes law." (*People v. Carmony* (2004) 33 Cal.4th 367, 376 (*Carmony*).)

The granting of a *Romero* motion is "subject to review for abuse of discretion. This standard is deferential. [Citations.] But it is not empty. Although variously phrased

in various decisions [citation], it asks in substance whether the ruling in question 'falls outside the bounds of reason' under the applicable law and the relevant facts. [Citations.]" (*Williams*, *supra*, 17 Cal.4th at p. 162; see also *People v. Garcia* (1999) 20 Cal.4th 490, 503.) This abuse of discretion standard also applies to appellate review of the denial of *Romero* motions. (*Carmony*, *supra*, 33 Cal.4th at pp. 374-376; see also *id.* at p. 375: " 'Discretion is the power to make the decision, one way or the other.' ") It is the defendant's burden as the party attacking the sentencing decision to show it was arbitrary or irrational, and, absent such showing, there is a presumption that the court " ' "acted to achieve [the] legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review." ' [Citations.]" (*Id.* at p. 377.) Such a discretionary decision " ' "will not be reversed merely because reasonable people might disagree." ' " (*Ibid.*)

3. Denial of the Romero Motion Was Not an Abuse of Discretion

Fregoso contends the trial court abused its discretion by denying his *Romero* motion. He argues that both the robbery and the assault of Garcia were committed during the same course of conduct and were "part and parcel of the force necessary to rob Garcia of his money." Fregoso adds that his criminal history is a consequence of his addiction to drugs. He contends the court did not adequately credit his efforts to address his drug addiction. We are not persuaded. The trial court expressly addressed Fregoso's history of drug use, his criminal history, and the facts of the prior convictions. Fregoso identifies other mitigating circumstances he contends the court failed to consider, but the court was not required to set forth on the record all its reasons for denying the motion. (*In re Large*, *supra*, 41 Cal.4th at p. 546, fn. 6.) Nonetheless, the court set forth the basis for its ruling, including the extensive nature of Fregoso's criminal history, the danger he presented to the public, and the criminal sophistication inherent in the current offenses.

The court denied the *Romero* motion after thoughtfully examining all relevant filings and considering the totality of the circumstances. We conclude the trial court did not abuse its discretion in doing so. Accordingly, this claim is without merit.

III. DISPOSITION

The judgment is affirmed.

_____
Greenwood, P.J.

WE CONCUR:

_____
Bamattre-Manoukian, J.

_____
Grover, J.

People v. Fregoso
No. H044572